No 09-872

IN THE

Supreme Court of the United States

MICHAEL CASEY, *et al* ,

Petitioners,

v

NORTH AMERICAN SAVINGS, F S B , *et al* ,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY IN SUPPORT OF PETITION

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REPLY DISCUSSION

Pursuant to Supreme Court Rule 15 6, petitioners reply to respondents' opposition to the petition for writ of certiorari.

I. The state laws at issue only incidentally affect the lending operations of federal savings and loans.

Respondents contend that this case "presents a poor vehicle to consider the question presented," because, assertedly, petitioners have not shown that the state law at issue would "only incidentally affect lending operations" within the meaning of 12 C F R. § 560 2(c), and thus would be preempted regardless of the decision on the question presented *Brief in Opposition* at 9 n 2

Respondents' contention is in error, as the state laws at issue only incidentally affect respondents' lending operations because the impact is only incidental to the primary purpose of the state laws

The "incidentally affect[ing]" issue was not discussed in detail or raised as a question presented in the petition for certiorari because the Court of Appeals never reached the issue Having reached its erroneous holding concerning Section 560 2(b), the Eighth Circuit concluded that, "further analysis under the § 560 2(c) exception is unnecessary" *Casey v FDIC*, 583 F 3d 586, 596 (8th Cir 2009) [A–18]

Their responsive brief notwithstanding, respondents know full well petitioners' arguments about why the Missouri laws at issue only incidentally affect lending operations, because the issue was fully briefed below Since respondents have nevertheless raised the issue as a purported ground for denial of certiorari, this reply presents the general outline of the argument establishing that the Missouri laws at issue are not preempted because they only incidentally affect lending operations

Section 560 2(c) provides that state laws of general application, such as the law of contracts and commercial and tort laws, "are not preempted to the extent that they *only incidentally affect the lending operations* of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section " (emphasis added)

The phrase "only incidentally affect" is not defined in the regulation, or in the authorizing statute, and is only infrequently analyzed in the case law The case law is sufficient, however, to establish that laws, like the laws at issue here, designed to restrict the unauthorized practice of law and other deceptive acts and practices, that are applied to all types of persons and businesses, ranging from real estate brokers to escrow companies to recreational vehicle dealers to HVAC contractors, *see Petition* at 12–15, only incidentally affect

the lending operations of those federal savings associations that come within their scope

The Seventh Circuit in *In re Ocwen Loan Servicing, LLC, Mortgage Servicing Litig* , 491 F 3d 638 (7th Cir 2007), held that various state deceptive acts and practices ("DAP") statutes—statutes similar to the Missouri MPA here—are not generally preempted because such laws only incidentally affect lending operations *Id* at 644 Relying on both the regulatory language and a formal opinion of the OTS chief counsel, the Seventh Circuit stated

> The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions The Indiana DAP falls within the category of traditional "contract and commercial" law under § 560 2(c)(1) *While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute—the regulation of the ethical practices of all businesses engaged in commerce in Indiana* There is no indication that the law is aimed at any state objective in conflict with the safe and sound regulation of federal savings associations, the best practices of thrift institutions in the

> United States, or any other federal objective identified in § 560 2(a) Accordingly, we conclude that the Indiana DAP is not preempted by federal law

Ocwen, 491 F 3d at 644 (ellipses and brackets in original deleted, emphasis added), quoting *Opinion of OTS Chief Counsel Preemption of State Laws Applicable to Credit Card Transactions* (Dec 24, 1996) at pp 9–10 [1]

Two district court decisions address the analysis to be used in determining whether a state law's impact on lending operations is only incidental "[T]he question is whether any impact on lending operations is incidental to the statute's primary purpose—not whether the impact of the statute on a bank's lending operation is 'incidental '" *Binetti v Washington Mutual Bank*, 446 F Supp 2d 217, 221 (S D N Y 2006) "[D]efendant's ability to conduct its banking business is no more than incidentally affected by the requirement that it comply with state laws that apply to all industries and individuals alike " *Baldanzi v WFC Holdings Corp* , 2008 U S Dist Lexis 95727, *8-*9 (S D N Y Nov 14, 2008) (holding that state-law claims for breach of contract and violation of state consumer protection act not preempted by the National Bank Act) *See also Gibson v World Savings & Loan Assn* , 103 Cal App 4th 1291,

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[1] As noted in the Petition, this OTS opinion is available on the internet at http //www ots treas gov/docs/5/56615 pdf

1302 (Cal App 4th Dist 2002) (when state law applies to anyone in business, and not just federal savings associations, the impact on savings associations is merely incidental)

Thus, the affect of the Missouri laws at issue here on the lending activities of respondents and other federal savings associations is only an incidental affect of those laws within the meaning of Section 560 2(c), and therefore the Missouri laws should be found not to be preempted should petitioners prevail on the question presented in the petition for certiorari

II. Respondents fail to address two of petitioners' key arguments, suggesting that they have no meritorious response.

Respondents offer no meaningful answer to the arguments asserted in Sections III and IV of the Discussion portion of the petition for certiorari

Section III demonstrates that the Eighth Circuit's interpretation of Section 560 2(b) effectively writes Section 560 2(c) out of the regulation That is because if, as the Eighth Circuit holds, a state law is always preempted if it affects lending operations as applied, then there will never be an opportunity in any case to consider whether such affect is merely incidental, as stated in the Section 560 2(c) exception to preemption Thus, if the Eighth Circuit is right, then Section 560 2(c) is superfluous *See Petition* at 26–27

Thus, the Eighth Circuit's interpretation of the regulation runs afoul of the well-established legal rule that courts should interpret statutes and regulations so as to give effect, whenever possible, to every clause and word used *Safeco Ins Co of America v Burr*, 551 U S 47, 59-60 (2007)

Respondents offer no response to this argument Indeed, it is not even mentioned in their brief in opposition to the petition

Section IV of the petition demonstrates the broad impact the Eighth Circuit's decision will have on other areas of the law if left uncorrected This impact results from the Eighth Circuit's failure to properly consider the meaning of the word "purporting," which appears in the phrases "purporting to regulate or otherwise affect" and "purporting to impose requirements regarding," as used in the regulation Section 560 2(a) & (b) Although the dictionary meaning of "purport", the root of "purporting", focuses on intentions and false appearances, the Eighth Circuit essentially gave the word no meaning at all in its analysis of the regulation

The petition demonstrated that this analysis, if followed in other legal arenas, such as ERISA, where preemption is statutorily defined in terms of "purports to regulate," the result would be to broadly expand the scope of federal preemption beyond its existing, well-established limits *See Petition* at 27–30

Despite the importance and length of this argument, respondents casually dismiss it as a "final gasp" and "nonsense," *Brief in Opposition* at 13, completely failing to address in any meaningful way the impact of the Eighth Circuit's analysis upon the present, established interpretation of these other statutes

Petitioners respectfully suggest that the reason why respondents do not address these important—and powerful—arguments is that there is no answer Petitioners' arguments are correct, and thus strongly support both the granting of the writ of certiorari and reversal of the judgment below

CONCLUSION

The petition for certiorari should be granted

Respectfully submitted,

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